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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 485-501) is reported at 350 F. 2d 689. The opinion and order of the Federal Power Commission (R. 395-416) is reported at 31 FPC 1079, and the opinion of the Federal Power Commission denying rehearing (R. 459-465) is reported at 32 FPC 8.

JURISDICTION

The judgment of the Court of Appeals was entered September 8, 1965 (R. 502). Petition for rehearing was denied by order issued October 8, 1965 (R. 505). Petition

for writ of certiorari was filed on January 3, 1966, and was granted February 28, 1966 (R. 506).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. 717r(b).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act [Sections 1(b), 7(b), 7(c) and 7(e), 52 Stat. 821, as amended, 15 U. S. C. 717-717w] are set out in Appendix A, infra, pages 1a-3a.

QUESTIONS PRESENTED

1. Does the Natural Gas Act authorize the Commission to require a pipe line company, without its consent, to continue to purchase gas after the Seller has cancelled the contract under which purchases had been made, and pay therefor a price, established ex parte by the Seller which is higher than the price contained in the cancelled contract?

2. If so, is the Act to that extent unconstitutional as violative of the due process requirements of the Fifth Amendment to the Constitution of the United States?

STATEMENT

United Gas Pipe Line Company (United) is a natural gas transmission company and Continental Oil Company (Continental) is a producer of natural gas.

On January 22, 1953, Continental and United entered into a contract covering the sale and purchase of gas produced by Continental in the Johnson Bayou Field in Cameron Parish, Louisiana. The contract was for a primary term of 10 years from January 31, 1953 (R. 196); provided, that the contract would automatically continue in effect after expiration of the primary term for successive periods of one year each, unless either party terminated the contract at the end of the primary term, or any succeeding annual period, by giving the other party 90 days prior written notice (R. 196). The contract contained fixed rates, plus provision for tax reimbursement by the buyer, and the rate actually being paid at the end of the second 5 year period of the contract was 10.79¢ per Mcf, which included 1.8¢ per Mcf tax reimbursement (R. 55, 224).

Continental filed the contract with the Commission and sought a certificate of public convenience and necessity authorizing this sale to United. The certificate was issued January 4, 1956 (15 FPC 1650).

The Johnson Bayou Field was located immediately adjacent to United's existing 16-inch transmission line extending from Southwest Louisiana to Beaumont, Texas, and in order to receive this gas into its existing transmission line, United constructed and placed in operation a separator, a meter station and 55 feet of 4-inch line (R. 20). United later sought and was issued on February 25, 1955, a certificate of public convenience and necessity approving the construction and continued operation of these facilities (14 FPC 582).

Exercising its option under the contract, on October 23, 1962, Continental wrote United advising (R. 13):

> "Continental Oil Company hereby gives notice to United that it elects to terminate said contract as of the thirty-first day of January, 1963."

Thereafter, representatives of Continental contacted United seeking execution of a new contract covering future sales of Johnson Bayou Field gas and specifying that it include, among other things, a new series of prices reaching 18.75¢ per Mcf, plus the right to charge the South Louisiana area rate if it proved to be higher (R. 14).

United was not agreeable to these terms and offered to continue purchasing on the basis of the existing contract, but the parties could not reach agreement. United then advised Continental that it would support an application by Continental to the Commission for abandonment of Continental's certificate to make this sale to United, and that United would contractually agree to continue buying Johnson Bayou Field gas on a day to day basis at the existing contract rate, pending the Commission's action on the abandonment application (R. 15). Continental declined to apply for an abandonment of its certificate, and it rejected United's offer to buy (R. 16).

Acting unilaterally, Continental then filed with the Commission on December 28, 1962, an increased rate of 15.75¢ per Mcf, including tax reimbursement, and gave notice that it would become effective January 31, 1963, the effective date of the contract cancellation (R. 17).

United filed a complaint with the Commission protesting Continental's unilateral rate filing and asking that it be rejected. Without having acted upon United's protest, (it was substantially rejected), the Commission on January 25, 1963, accepted the unilaterally filed rate increase and permitted it to become effective on January 31, 1963. When advised thereof, United told Continental it would discontinue receipts of Johnson Bayou Field gas on January 31, 1963 (R. 19).

Continental thereupon filed a petition with the Commission asking that United be required to show cause why it should not be required to purchase Johnson Bayou Field gas (R. 242-250). United filed an answer to the petition and on May 1, 1963, the Commission directed a show cause order to United. United was not directed to show cause why it should not be required to purchase Johnson Bayou Field gas, rather United was directed to show cause "* * * why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental Oil Company from Johnson Bayou Field, Cameron Parish, Louisiana." (R. 267-271) Upon hearing, United made proof of the above facts and showed the following additional facts.

United was, at the time of the hearing, over bought on gas in South Louisiana. At that time United had, in compliance with contractual minimum purchase obligations, paid producers in South Louisiana over the preced-

ing 2-½ years approximately 15 million dollars for gas it could not take into its system because it had no market for the gas (R. 19). It had since January 31, 1963, supplied its customers' requirements without any Johnson Bayou Field gas, and its facilities in that field remained in place and could be used at any time to receive gas from the field if needed (R. 20-21).

United's markets for gas from the Johnson Bayou Field were in the Southeast Texas area where it sold much of its gas to industrial customers at contractually fixed prices, and where it was experiencing severe competition from unregulated intrastate producers who were taking customers from United by offering them gas cheaper than United could sell it (R. 21). United's proof was that it needed to cut its costs to meet this competition, and not increase them as paying Continental's unilaterally increased rate would force it to do.

The Commission's presiding examiner found that United had abandoned none of its facilities or any "service" rendered its customers, and he dismissed the show cause order (R. 324-334).

The Commission, one commissioner dissenting, reversed its examiner, holding that the cessation of flow of gas through United's Johnson Bayou Field facilities was an abandonment of those facilities accomplished without the Commission's prior approval under Section 7(b) of the Act. Having adjudicated the issue posed by its show cause order, the Commission ordered United to purchase Continental's gas, directed that it pay therefor

Continental's unilaterally filed rate, and that the purchases be made in volumes consistent with the cancelled contract (R. 395-416).

Upon motion by United, the Commission granted a stay of its order (R. 418-419), but in denying United's petition for rehearing, it refused to continue the stay pending court review (R. 459-465).

United appealed the Commission's order to the United States Court of Appeals for the Fifth Circuit and asked a stay of the Commission's order pending judicial review, but the stay was declined. In its opinion on the merits, the court agreed with the Commission that the cessation of flow of gas through United's Johnson Bayou facilities constituted an abandonment of those facilities, but the court was "Not so sure just what the effect might be" of this conclusion with respect to the Commission's asserted power to require United to pay Continental's unilaterally established rate. The court affirmed the Commission's order on the basis of its view that Section 7(b) applied to the buyer as well as the seller in a "jurisdictional sale" and that both the buyer and the seller must each obtain Commission approval before terminating the transaction. The court then held United had no choice but to pay Continental's unilaterally established rate, until granted abandonment authorization pursuant to Section 7(b), and that the constitutional issues raised by United were matters for consideration if an abandonment were subsequently denied (R. 485-501).

SUMMARY OF ARGUMENT

In *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392, this Court noted that a certificate unlimited as to term imposed an obligation on a producer, as had long been the case with pipelines, to continue selling upon the buyer's "request" after expiration of the underlying gas sales contract, unless it could justify an abandonment before the Commission. *Sunray* pointed out that this obligation carried with it the right in the producer to change its rates without the buyer's consent, for service rendered at the buyer's "request" after expiration of the contract.

Insisting that its obligation to serve imposed on the buyer the obligation to buy after the contract term, and to do so at increased rates unilaterally determined and filed by the seller, Continental cancelled an existing contract with United, rejected United's offer to contract, unilaterally filed a higher rate for its gas than United was willing to pay, and secured a Commission order forcing United not only to purchase but to pay Continental's rate.

Never before in the history of the Act has the Commission assumed it had power to order purchasing or the payment of an increased price fixed unilaterally by the seller.

This mandatory order, directed to the purchaser, requires purchasing. It is an unlawful extension of Commission jurisdiction into an area not covered by the Act. Legislative history shows Congress declined to adopt a

bill which included jurisdiction over purchasing; Section 1(b) of the Natural Gas Act, which defines its coverage, does not include purchasing; and the government concedes in this Court that the Act's coverage does not include purchasing.

The Commission's justification for its order is that, unless it has power to require purchasing, gas will cease flowing through some of United's facilities and this will constitute an unauthorized abandonment of facilities and reserves. The Commission's justification is obviously fallacious for it assumes the existence of power not granted by the Act.

Under the Act rates are made by contract. In *United Gas Pipe Line Co. v. Mobile Gas Corporation*, 350 U.S. 332, 100 L. ed. 373, this Court held that the rate-making powers of natural gas companies are "unaffected" by the Act, and that a seller determining its rates ex parte (as Continental did here) can do no more than offer its service and rate to the buyer as a "prospective" customer. The Commission's order unlawfully forces a buyer to buy and to pay the seller's ex parte rate.

The Commission's order forces United to incur costs it cannot recover. Under the Act all gas is sold by contract, and United sells 43 per cent of the total volume it handles directly to industrial customers for their own use. The Commission has no power to raise any rate, and it has absolutely no jurisdiction over rates for direct industrial sales. Because the Commission has no authority to increase existing contract rates in order to recover in-

creased costs, the consequence of the Commission's order will be to render sales of gas by pipelines at contractually fixed prices economically ruinous.

If the Act contains provisions, which United denies, that force United to buy Continental's gas and to pay Continental's unilaterally increased price, it results in the taking of United's property without any provision for adequate compensation and is, to that extent, violative of the Fifth Amendment to the Constitution.

ARGUMENT

1. Basic Errors In The Decision Below.

In *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392, this Court held that the Commission had power to tender to a producer a certificate which was not limited to the term of underlying sales contract, notwithstanding the fact that the producer had requested such a limited certificate. Having so ruled, the Court commented on the rights and obligations that would come into existence after expiration of the contract. In substance the Court said the Act imposed an obligation on the seller to continue selling gas on the buyer's "request", unless the seller could justify an abandonment before the Commission. (The Commission had previously recognized and enforced this obligation as to both pipelines and producers.) The Court went ahead to say that the obligation carried with it the right in the seller unilaterally to file needed rate increases applicable to this continued service. The Court's statement

was fully consistent with, and implemented, two complimentary aspects of the Natural Gas Act, i.e., the Act does not regulate "purchasing", and rates under the Act are fixed by contract.

Insisting it read into the Court's language an obligation on the buyer to continue buying after expiration of the contract, and to do so on the seller's terms, Continental set in motion a series of events intended to force United not only to buy Continental's gas but to pay a higher rate than United was willing to pay. When United refused, Continental complained to the Commission and the Commission issued the order giving rise to this proceeding.

The Commission's order, for the first time in the history of the Act, requires a buyer: (1) to purchase gas; (2) to pay a price fixed unilaterally by the seller without contractual assent by the buyer; and (3) to purchase volumes consistent with a cancelled contract. This mandatory order, directed to the purchaser, is explicit regulation of "purchasing" and denies the buyer its right to contract. It is violative of clearly expressed Congressional intent and the specific wording of the Act.

In issuing its order the Commission did not rely on any claimed grant of power to regulate "purchasing", or to force the buyer to accept the seller's rate, rather it relied on its own argumentative conclusion that the power granted it to authorize abandonments of physical facilities necessarily gave it power to require purchasing in order to prevent the abandonment of facilities. The

Court of Appeals affirmed the order on the basis of its view that Section 7(b) applied to the buyer as well as the seller in a "jurisdictional sale".

The decision below rejects this Court's pronouncement in *Sunray*, that continued service is required on the buyer's "request", and holds that the Commission can force the buyer to both accept continued service and pay the seller's unilaterally increased rate. In doing so, the decision not only denies the buyer the right to contract as to rates, it forces increased costs on the buyer which cannot be recovered and renders the buyer's resale of gas at contractually fixed prices economically ruinous.

2. The Government Here Concedes That Section 1(b) Does Not Bring Purchasing Of Gas Within The Commission's Regulatory Power.

Significantly, in its Brief in Opposition to the petition for writ of certiorari the government concedes that Section 1(b) does not bring purchasing of gas within the coverage of the Act. The following appears on page 5 of the brief:

> "Although *Section 1(b) does not explicitly bring within the Commission's regulatory power the purchase of natural gas*, it does give the Commission authority over 'transportation of natural gas in interstate commerce' * * *". (Emphasis added)

In *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516, 68 S. Ct. 190, 92 L. ed. 128 (1947), this Court emphasized that Section 1(b) "* * * determined the Act's coverage * * *." Thus

the government's concession on purchasing necessarily extends to the entirety of the Act, including those subordinate sections which empower the Commission to issue certificates of public convenience and necessity and to authorize abandonments. The concession, in its full implication, is an obviously correct statement of the law. The terms purchase and purchasing do not appear in the Act, and the Court of Appeals held: "There is in the Act no provision that a purchaser must, or even may, obtain a certificate to purchase gas."

3. Legislative History Shows Congress Declined To Bring Purchasing Under Commission Control, And The Commission Has Heretofore Not Regulated Purchasing.

Legislative history shows that at the time Congress was considering passage of the Natural Gas Act, it declined to adopt a then pending bill which would have brought within the Commission's regulatory control the "procurement" of natural gas by pipelines, as well as the "sale, exchange, transmission, or distribution" of gas in interstate commerce. The bill Congress did adopt contained the more limited coverage spelled out in Section 1(b).(1) This Court has had occasion to refer to

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(1) In *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 515, 516, this Court said:

"Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."

this legislative history, as reflected in the following quotation from *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 513, N. 16, 93 L. ed. 1499:

> "While Congress was considering the passage of the Natural Gas Act, a bill (HR 5711 and S 1919, 75th Cong 1st Sess) was introduced in both houses of Congress on March 17, 1937, which provided that 'this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distribution in interstate commerce * * *' * * *.
>
> "The provisions of this bill, however, failed of adoption; instead Congress enacted § 1(b) with its specific exemptions from the coverage of the Act."

The Congressional intent reflected in both this legislative history and the clear wording of Section 1(b) was, until this decision, followed throughout the twenty-seven year history of regulation under the Act. Never once during this period did the Commission assume it had power to require a pipeline either to purchase gas or to ask its permission to stop purchasing. Quite the contrary, for in 1960 the Commission authorized a producer to abandon its certificate to sell in a decision which reflected the view that a pipeline purchaser was free to discontinue purchasing from the producer upon expiration of its ten year contract with the producer.

In *P. R. Rutherford, et al,* Docket No. G-10,922, 23 FPC 357, the Commission authorized the producer to abandon its certificate to sell upon a showing that the

pipeline had ceased purchasing after expiration of its contract with the producer. In his concurring opinion Commissioner Connole pointed out (23 FPC 357, 360):

> "* * * Moreover, *no use whatsoever has been made of the service authorized under the certificate in the last two years despite a willingness and ability of the certificate holder to render the service.* Dormancy is to be avoided as a matter of public policy in certificates of public convenience and necessity. To continue the certificate here would create a dormant certificate. Plainly it would be a vain act for *we cannot compel the pipeline to purchase the gas and the certificate holder cannot be required to sell its gas if the buyer is unwilling to buy.*" (Emphasis added)

The significance of this decision is brought into sharp focus when it is recognized that at the time it was issued the Commission had long recognized and applied the rule that the seller's certificate imposed the obligation on the seller to continue selling, upon the buyer's demand, after expiration of the underlying sales contract.(2)

4. The Act Permits The Buyer To Reject A Seller's Ex Parte Established Price.

Under the Act rates are fixed by contract. When Continental cancelled its gas sales contract with United and availed itself of the right to fix its rate unilaterally,

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(2) A pipeline in *United Gas Pipe Line Co.* 3 FPC 3 (1942), and a producer in *Harper Oil Company,* 22 FPC 756 (1959), were denied permission to abandon their unlimited certificates to sell when the buyers demanded continued service after expiration of sales contracts.

it then "offered" its service on the basis of its ex parte rate and United, under these circumstances, had the right of a "prospective" customer to accept or reject service at the offered rate. The Commission had no authority over this rate other than to review it and reduce it, if it were higher than "just and reasonable" when measured by Continental's needs; and nothing in the Act operates to force United to accept either the rate or the service, or authorizes the Commission to force United to do so.

There have been three decisions by this Court, all involving United, which are in point here. In *United Gas Pipe Line Company v. Mobile Gas Corp.*, 350 U.S. 332, 100 L. ed. 373, United sought, during the term of its contract, to increase a rate it had contractually agreed to with Mobile, a purchaser. It filed a new rate with the Commission and asked that it make the higher rate effective. Mobile opposed and United argued that the Act permitted it to initiate such a proposed change and authorized the Commission to make it effective. Upon review this Court said 'no', and in doing so reviewed at length both the rate-making powers of natural gas companies and the Commission's powers with respect to rates. The pertinent language from *Mobile* is as follows:

> "* * * *In short, the Act provides no 'procedure' either for making or changing rates; it provides only for notice to the Commission of the rates established by natural gas companies and for review by the Commission of those rates.* The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

> "All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, *the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers;* or to fix by contract, and change only by mutual agreement the rate agreed upon with a particular customer."(3) (Emphasis added)

When applied here, this language leaves no room for conjecture. First, it says the Act presumes a capacity in the parties to contract as to rates. Secondly, it says that rate-making powers of the parties are unaffected by the Act, that they have the rate-making powers they would possess absent the Act. Thirdly, it says these powers are to fix by contract, and change only by agreement, rates agreed on with a particular customer; or to fix ex parte, and change at will, the rates OFFERED prospective customers. Lastly, it says the Act provides no procedure for making rates and that the Commission can only review rates.

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(3) 340 U.S. at page 343.

Thus this Court has said in the clearest possible terms that the rate-making powers of natural gas companies are "unaffected" by the Act, and that the Commission cannot make rates. (The Commission's power to "review" rates set by natural gas companies does not change this basic plan of the Act.) From this it necessarily follows that Continental's power to fix a rate for its Johnson Bayou Field gas, and United's power to accept or refuse that rate, were "unaffected" by the Act and remained the same as they would have been "in absence of the Act"; and nothing in the Natural Gas Act, be it Section 7(b) or otherwise, imposes any obligation on United to accept Continental's rate, absent United's assent thereto.

Clearly, rates under the Act (as would be the case in the absence of the Act) are made either by bilateral contracts in which rates are agreed on and changed only on mutual consent, or by unilateral contracts, in which the seller offers a rate and the buyer accepts or rejects the offered rate by buying or refusing to buy.(4) United respectfully points out that rates fixed by both types of

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(4) Restatement of The Law of Contracts, Volume 1, 312, page 10:

> "A unilateral contract is in a very real sense, as its name implies, a one-sided contract. There are two parties to the contract, it is true, and a manifestation of assent on the part of each is usually necessary to its formation; but one of the requisites for making the contract should not be confused with the contract itself. The contract is merely the promise, not the mutual manifestation of assent or the consideration paid for the promise. In a bilateral contract, on the other hand, as there are contractual promises on both sides, the contract is properly called bilateral."

contracts arrive at the same end — acceptance of the rate by both parties. The essential ingredient to any completed contract, be it bilateral or unilateral, is agreement; the difference between the two types being that agreement is reached before performance in the bilateral contract and reached by performance in the unilateral contract.

Having cancelled the contractually agreed on rate for Johnson Bayou Field gas, Continental's rate-making power remained that of either agreeing with United on a new rate or, in the language of *Mobile*, "to establish ex parte, and change at will, the rates offered to prospective customers". Having decided on the latter course of action, it "offered" its increased rate to United as a "prospective" customer.

This Court's holding in *Mobile* concerning the rate-making powers of natural gas companies was repeated literally(5) and emphasized in *United Gas Pipe Line Company v. Memphis Light, Gas & Water Division*, 358 U. S. 103, 3 L. ed. 2d 153, where it was held that a seller could file and collect a rate determined ex parte when that arrangement had been contractually agreed to by the parties.

The third decision in point here has been referred to above. It is *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392. As indicated above this case affirmed the Commission's power to grant a producer an unlimited certificate which extended beyond the term of the producer's contract to sell. Sunray argued that the Commission

(5) 358 U.S. at page 110.

lacked power to refuse it a certificate limited to the term of its sales contract, insisting that such refusal denied it the right to contract as to rates. In rejecting this argument this Court said that the unlimited certificate in no way denied Sunray its right to contract as to rates. The Court's language was as follows:

> "*It is apparent that the Commission's order in no way violates the integrity of petitioner's contract with United.* During its term, both parties are bound by it to the same extent as any members of this regulated industry. *When it expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission;* but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act. *It will be free then, as it was not free during the contract term under the contract here in question, to make rate changes under § 4 without United's consent.* It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it. But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength."(6) (Emphasis added)

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(6) 364 U.S. at page 155.

United has emphasized portions of the above quotation because the language makes clear that the existence of an unlimited certificate does not detract from either party's right to contract as to rates. During the term of their bilateral contract both parties remained bound by their agreement. Upon expiration of the bilateral contract, Sunray could file increased rates and United could accept or reject those rates by requesting or not requesting service. United's right to do this is recognized in that portion of the Court's language which said that Sunray's obligation was "* * * to continue to deliver gas to United *on the latter's request* * * *." The Court's use of the words "on the latter's request" was exact and meaningful because Sunray stressed the argument that the Commission's refusal to grant it a certificate limited to the term of the contract placed it in "* * * a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it."(7)

Sunray did not change the recognized plan of the Act with respect to service or rates, rather it reaffirmed it. And however vexing to the seller, the obligation to continue service on the buyer's request is not unfair to the seller. The seller is at liberty to file and collect an adequate rate for the service. If the service is not requested, the seller is entitled to an abandonment. There is nothing in these circumstances that can support a charge of unfairness to the seller. Unfairness lies in the opposite

(7) 364 U.S. at page 155.

direction — that of forcing the buyer to buy on the seller's unilaterally established terms.

If, after cancelling its contract, Continental was discontent with United's purchasing, then two courses of action were open to it. First, if Continental wanted stability in volumes purchased which a contract would have furnished under *Mobile*, it should have contracted for it. United offered such a contract and the offer remains open. This offer did not suit Continental anymore than Continental's offer suited United. But the fact that each party disliked the other's terms does not mean that Continental was right and United was wrong, and it did not give the Commission power to force United to accept Continental's terms.

The course alternatively available to Continental was to apply to the Commission for permission to abandon its certificate to sell this gas to United. United had told Continental in writing it would support the abandonment. The Commission certainly would have granted the certificate had it acted on the basis of law and its own precedent.

5. The Decisions Below Misinterpreted Sunray.

The decisions below misinterpreted *Sunray*. They view *Sunray's* holding, that producers with unlimited certificates are required to serve beyond the contract term, as in some way changing or going beyond the established law with respect to rates and with respect to buyer's right to "request" service after expiration of its contract with the seller. In their view *Sunray* changed the buyer's right

to "request" service into an obligation to accept service, and it changed the buyer's right to contract as to rates into an obligation to accept the seller's ex parte rates. As a matter of fact, this completely incorrect interpretation of that decision was the decisive consideration that shaped the decision of the Court of Appeals.

But *Sunray* did not change the law with respect to rates, or with respect to the buyer's right to request service after expiration of its contract with the seller. *Sunray* did not say that the seller's obligation with respect to continuing service imposed an obligation on the buyer to continue buying. More especially did *Sunray* not say that the seller's obligation to continue service imposed an obligation on the buyer both to buy and to do so on the seller's terms. *Sunray* said just the opposite. It said that the producer's obligation, was to continue service on the buyer's "request", thus accurately affirming the contingent nature of the obligation imposed by an Act which did not regulate purchasing and which maintained in the buyer the same right to contract for service and rates it would have possessed "in the absence of the Act".

6. The Commission's Error In Ruling United Had Violated Section 7(b) And In Using Section 7(b) To Force United To Buy Gas On Continental's Terms.

The Commission ruled it necessarily had jurisdiction to order purchasing at Continental's price because, it said, by refusing to purchase at Continental's price United had violated Section 7(b) of the Act. The claimed

violations are: violation of a "cease purchasing" test contained in Section 7(b) and abandonment of facilities and reserves without prior approval of the Commission.

The answer to these assertions is twofold. First, there is no "cease purchasing" test in Section 7(b); and, second, the conclusion that to cease purchasing on any terms is to abandon facilities and reserves begs the question. The question is does the Commission have jurisdiction to order a buyer to purchase gas at the seller's unilaterally fixed price? That question is not answered by pointing to facilities and reserves and saying they will be abandoned unless we have authority to force United to purchase gas at Continental's price.

The Commission's ruling on United's argument that "* * * we [the Commission] lack the power to compel pipelines to purchase gas after the expiration of gas sales contracts"(8) was as follows:

> "* * * Moreover, United ignores the thrust of Section 7(b). That section frames the relevant issue, not in terms of whether this Commission has the power to compel continued purchases, but whether the 'public convenience and necessity' dictates that pipelines *cease* purchasing." (Emphasis theirs)

But Section 7(b) imposes no test to be met before pipelines cease purchasing. The terms "purchasing" and "cease purchasing" do not so much as appear in the section. The section does not deal with purchasing and it frames no test with reference to purchasing. No purchaser of gas

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(8) Opinion 426, R. 404.

has ever obtained Commission approval to cease purchasing.

Moreover, United has no certificate to purchase Johnson Bayou Field gas and the Commission has no authority to issue such a certificate. United's position without a certificate can be no more exacting than Sunray's would have been had it received a certificate limited to twenty years. In the absence of a certificate, either because of its expiration or because its issuance is not authorized, the Commission cannot interpose Section 7(b) to prevent discontinuance of an act.

The question of whether the Commission has authority to order the purchasing of gas at a price fixed unilaterally by the seller is not answered by the Commission's insistence that, without such authority, facilities and reserves will be abandoned. Before discussing this further, United points out that in fact it has abandoned neither facilities nor reserves. When United ceased purchasing Johnson Bayou Field gas, all it did physically was close a series of valves. It removed none of its facilities and it altered none of them. And the Johnson Bayou Field reserves remain physically attached to United's system. If there were a drainage problem, and United does not believe there was, it resulted from Continental's insistence that it preferred drainage to selling its gas to United at 10.79¢ per Mcf, and from its refusal to apply for an abandonment in order to sell its gas to another purchaser.

In *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U. S. 498, 93 L. ed. 1499, this

Court ruled on exactly the same process of reasoning employed here by the Commission with reference to implied jurisdiction. There Panhandle, the owner of a pipeline system transporting natural gas in interstate commerce, transferred gas leases to a subsidiary and the subsidiary contracted to sell the gas to be produced from the leases to an intrastate purchaser. In *Panhandle*, as here, the Commission reasoned that gas reserves are an essential element of natural gas service (in *Panhandle* they were termed the "lifeblood" of service) and that such disposal of reserves, previously relied on in granting the pipeline certificates to construct facilities and sell gas, might render the pipeline unable to perform. This, the Commission said, would result in an abandonment of both service and facilities without the Commission's prior approval granted under Section 7(b), and therefore the Commission had jurisdiction to regulate the sale of leases. The Court rejected that argument and held that Section 7(b) could not be relied on to achieve jurisdiction not otherwise granted by the Act. The Court's language was as follows:

> "The Federal Power Commission leans heavily upon § 7(b) which provides that no natural-gas company may abandon any of its facilities subject to the jurisdiction of the Commission without the prior approval of the Commission. *The argument here is that since natural gas is the 'lifeblood' of a pipeline system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the con-*

sent of the Commission will result. The argument begs the question." (9)

Power does not exist in the Commission to force the purchasing of gas at a rate unilaterally fixed by the seller, and Section 7(b) cannot be relied on by the Commission as an excuse for doing so.

7. The Decision Below Forces United To Incur Costs It Cannot Recover And Renders Economically Ruinous The Pipelines' Sale Of Gas At Contractually Fixed Rates.

The Commission's order forces United to incur increased costs, yet *Mobile* held that neither the Commission nor United had power to raise United's contractually fixed, jurisdictional rates to recover increased costs. In *Mobile* United proved that its rate applicable to a sale for resale in interstate commerce was so low as not to afford United a reasonable return. Agreeing an increase was required if United was to recover its costs and earn a reasonable return, the Commission approved a rate increase and authorized United to collect it. The Commission was reversed on appeal, and this Court sustained the reversal saying:

"Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply

(9) 337 U.S. at pages 508-509.

> contracts are subject to unilateral change by the natural gas company whenever its interests so dictate."(10)

These comments are equally applicable here, and they forecast the havoc which will result if producers can impose on pipelines acceptance of unilateral rate increases.

Moreover, United's latest report (Form 2) to the Commission shows that for the year 1965 United sold 558,249,762 Mcf of gas directly to industrial customers for their own use. This 43 per cent of United's sales falls in a category over which the Commission has no rate jurisdiction whatever. Most of this gas (68 per cent) was sold at specific prices, contractually fixed. There is no way United can recover increased costs from these industrial customers.

The Commission's order strikes at the very heart of the pipeline's ability to sell gas at contractually fixed prices. If the pipeline cannot control the upward limit of the price it will pay for gas, it will be economically ruinous for the pipeline to sell gas at contractually fixed prices.

8. If The Natural Gas Act Forces Purchasing On Terms Unilaterally Imposed By The Seller, Without Consideration Of The Needs Of The Buyer, Then The Act Is To That Extent Unconstitutional.

If the Natural Gas Act does contain provisions, which United denies, that permit Continental unilaterally

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(10) 350 U.S. at page 344.

to fix the quantities of gas United must buy and the rate it must pay, all without consideration of the needs of United and without provision for United to recover the increaesd costs forced upon it, then the Act is to that extent unconstitutional.

If the Act contains such provisions, they serve both to take United's properties and to deny United its ability to maintain its markets and earn a reasonable return; and this by an Act which does not empower the Commission to make rate changes required to compensate for such taking of property, and which does not empower the Commission to protect the interstate sale of gas from discriminatory intrastate competition even from those producers who can unilaterally fix the price United must pay for gas.

Whatever the Commission's power to force Continental to sell its gas during the full term of its certificate, that power does not violate Continental's right to adequate compensation for the gas sold after the contract term. This is true because the Act, as interpreted by the Commission and the Court of Appeals, affords Continental, after expiration of the contract term, both a market for its gas and the right to fix the price at which its gas will be sold, subject only to review by the Commission and possible reduction of the rate if it is higher than that which is just and reasonable when measured by Continental's needs.

The Act extends no corresponding protection to the buyer of the gas.

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 184, 95 L. ed. 190, the Oklahoma common purchaser statute was held not to violate constitutional prohibitions where it provided "* * * that if no agreement can be reached [between seller and buyer] then the price and terms shall be such as may be fixed by the Corporation Commission after notice and hearing." In *Republic Natural Gas v. Oklahoma*, 334 U.S. 62, 69, 92 L. ed. 1212, Mr. Justice Rutledge, joined by Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Burton, dissenting (the majority did not reach the merits) spelled out that required of the Oklahoma Commission in fixing the price for such forced purchasing:

> "This assumes that if the parties should be unable to agree upon terms the commission will fix them in a manner taking due account of prevailing market conditions relevant to the price to be paid, as well as reasonable compensation for the use of Republic's facilities. With those limitations properly applied, it is hard to see what great business risk will be shifted to Republic."(11)

No corresponding power exists under the Natural Gas Act. The Federal Power Commission cannot adjust Continental's rate downward to a level which, taking due account of market conditions, will afford United a reasonable compensation for the use of its facilities. Neither can the Federal Power Commission adjust United's rates upward

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(11) 334 U.S. at page 99.

to guarantee United reasonable compensation; for, under *Mobile*, proof of a non-compensatory rate does not empower the Commission or United to adjust United's jurisdictional rates without the customers' consent, and the Commission has no rate jurisdiction of direct industrial sales.

Under the Act gas is sold by contract, and if increased costs render existing jurisdictional rates less than compensatory, as was the case in United's sale in *Mobile*, the Commission cannot authorize United to increase that rate to one that is just and reasonable. And United sells 43 per cent of its gas directly to industrial consumers for their own use. If increased costs render the existing rates for those sales less than compensatory, the Commission can take no cognizance of that fact whatever.

Moreover, United operates in gas producing states (Texas and Louisiana) where unregulated competition from intrastate suppliers of natural gas is real and highly effective. Untold numbers of producers in these states are willing and anxious to dispose of their natural gas reserves in intrastate commerce where producers' rates are not regulated and certificates to sell are not required. United has lost to this competition numerous industrial and resale customers it had previously served for years. United must strive to keep its markets in the face of this competition without any protection or assistance from the Commission under the Natural Gas Act. This was force-

fully demonstrated to United by a recent decision of the Commission.

In September, 1963, United filed a complaint with the Commission asking that it protect the interstate service United was rendering the City of Tyler, Texas, under a certificate granted by the Commission. To do this the complaint asked the Commission to order a producer not to take the Tyler market from United by supplying unregulated intrastate gas at a lower rate than United's federally controlled rate. The Commission dismissed the complaint as beyond its competence solely because the competition was from an intrastate supplier.[12]

United must strive to keep its markets and to earn a fair return and it can do either or both only if it controls its costs and keeps its rates low enough to cause its customers to continue to buy from United. The Commission's order not only makes no provision for compensating United for the taking of its property, it actually denied United the right to control its costs and thereby denies United the opportunity effectively to keep its markets and earn a fair return.

United's property, in the form of cash and pipeline facilities, has been taken without any provision for adequate compensation to United for such taking. United denies that the Act authorizes this, but if it does the Act is to that extent violative of the Fifth Amendment to the Constitution of the United States.

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(12) The Commission's decision is reported at 30 F.P.C. 1196.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

Natural Gas Act

Section 1. (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or pre-

decessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of any application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service

proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.